Supreme Court, U.S.
FILED

06-17 JUN 29 2006

OFFICE OF THE CLERK

Case No.

IN THE

Supreme Court Of the United States

CATHY D. BROOKS-McCOLLUM,

Petitioner(s)

v.

Kenneth Shareef, Renford Brevett, Maudy Melville,
Valerie Longhurst, Ruth Vivardis, Mark Martell,
Edward Kafader, Ferry, Joseph & Pearce

Respondent(s)

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

Cathy D. Brooks-McCollum (Pro Se)
PO Box 12166
Wilmington, DE 19850
(302) 521-1241

QUESTIONS PRESENTED FOR REVIEW

1. Does the Constitution provide parties to carry out crimes as result of the States violation of Federal Law and the Constitution and after its' ruling, made in an effort to help and aide a friend?

2. Does the Constitution allow a State Court and/or the State to rule against Federal law and then admit that it erred, and then claim the error affords immunity? Then would the State and parties who benefited and acted on error all become State Actors for having violated another's' constitutional right thus disallowing the other party their Fourteenth Amendment Right?

3. Do the Constitution and Federal law and what the US Supreme Court intended allow all proceedings associated with a case to be Stayed until at such time Indemnification is ruled upon and a decision has been made in all courts regarding the States violations on issues before it?

4. Should there have been a ruling regarding the validity of a Settlement agreement made while issues were in the Federal courts between Petitioners and Respondents, as submitted before the US Court Of Appeals For The Third Circuit, where no official hearing was had in the US Court Of Appeals, when Respondents signed and agreed to in writing, and Petitioner filed a Motion For Specific Performance in both the US District Court For The State of Delaware and the US Court of Appeals For The Third Circuit?

5. Should the US Court maintain jurisdiction, since it is clear that the State erred (or intentionally ignored the laws) and in doing so violated Petitioners rights, and along with Respondents caused Petitioner to lose property?

6. Does the US Courts have jurisdiction to Order the State To adhere to the law pursuant Federal Law and the Constitution, and allow Petitioner to be indemnified in order to proceed with trial, and is Indemnification prior to trial what this court intended to protect a party, as well as one to have counsel to continue a Derivative action on behalf of a Corporation, where coverage is available?

LIST OF ALL PARTIES TO PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS

1. Kenneth Shareef
2. Renford Brevett
3. Maudy Melville,
4. Valerie Longhurst
5. Ruth Vivardis
6. Mark Martell,
7. Edward Kafader
8. Ferry, Joseph & Pearce

TABLE OF CONTENTS

Page

Questions Presented i

Parties to the Proceeding ii

Table Of Contents iii

Table of Cases and Cited Authorities iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Summary of Argument 15

TABLE OF CASES AND CITED AUTHORITIES

Pages

First Amendment 8

§1983 11

Delaware Title 8, Subchapter IV, Section 141 of the General Corporation Law 8

Delaware Title 8, Subchapter IV, (a) of the General Corporation Law 8

Delaware Title 8, Chapter 1, Subchapter IV, Section 145(d) 8

Fourteenth Amendment 8

Ninth Amendment 6,8,10

STATUTES AND REGULATIONS

Pages

Accord, Augat, Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996) 8

American Casualty Co., 839 F.2d 212 (4th Cir. 1988) 7

Atlantic Permanent Federal Savings & Loan Assoc. v Augat Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996) 8,11

Ayeni v. Mottola, 35 F.3d 680, 688 n.10 (2d Cir. 1994) 111

Barry v. Barry, 824 F.Supp. 178 (D.Minn. 1973) aff'd., 28 F. 3d 848 (8th Cir. 1994); 11

Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353 (1997). 3

Blessing, supra, 520 U.S. at 340-341 3

Boatmen's Bank v. Crossroads West Shopping 13

Carlson v. Green, 446 U.S. 14, 18-20 (1980) 11

Carmody v. Toll Brothers Inc., Del. Ch., CA No. 15983 (July 24, 1998) 9

Cede & Co. v. Technicolor Inc., 634 A.2d 345 (Del.1993) 9

Chicago Inv. Corp. v. Dolins, 107 Ill. 2d 120, 481 N.E.2d 712, 715 (1985). 13

Commercial Credit Development Co. v. Scottish Inns, Inc., 69 F.R.D. 110, 117 (E.D. Tenn. 1975)). 5

Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958 4

Dickey v. Thirty-Three Venturers 13

Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981) 11

Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) 13

Gilbert v. United States, 359 F.2d 285, 287 (9th Cir.1966) 9

In re Healthco Int'l Inc. 1997 Bankr. LEXIS 465 (Bankr.D.Mass.April 9, 1997) 9

Heffernan v. Pacific Dunlop GNB Corp., 1992 U.S. App. LEXIS 12595 (7th Cir., June 5, 1992) 10

Hibbert v. Hollywood Park, Inc., 457 A.2d 339 (Del. 1983) 8

In Citadel Holding Corporation v. Roven, 603 A.2d 911 (Del. 1992) 10

In Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977) 12

In Pereira v. Cogan, 2003 U.S. Dist. Lexis 7818 (S.D.N.Y. 2003) 9

In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch.1996) 9

In re P.J. Keating Company, 180 B.R. 18 (Bankr. D.Mass. 1995) 7

In re Sawyer, 124 U.S. 200 (1888) 4

In re Worldcom, Inc. Secs. Litigation, 382 F.Supp. 2d 549 (S.D.N.Y. 2005) 12

*In Redyd v. Electronic Data Systems Corp., No. Civ. A. 19467, 2002 WL 1358761 at *3 (Del. Ch. June 18, 2002)* 11

In Stifel Financial Corporation v. Cochran 11

Kapoor v. Fujisawa Pharmaceutical Co., 1994 Del. Super. LEXIS 233 (May 10, 1994); 13

Kokkonen v. Guardian Life Ins. Co. of America (United States Supreme Court) 13

Laserage Tech. Corp. v. Laserage Lab., Inc., 972 F.2d 799, 802 (7th Cir. 1992). 13

Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960) 4

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) 4

Lipson v. Supercuts, Inc., Civil Action No. 15074 (Del. Ch. Ct., Dec. 10, 1996) 10

Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994) 4

Livadas v. Bradshaw, 512 U.S. 107 (1994) 3

Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982). 11

McCain v. Florida Power Corp., 593 So.2d500 (Fla. 1992); 12

Megeath v. PLM International, Inc., Case No. 930369 (Cal. Sup. Ct. San Fran., Mar. 18, 1992) 10

McClure v. Borne Chemical Co., 292 F.2d 824, 827 (3d Cir.), cert. denied, 368 U.S. 939 (1961). 6

Neal v. Neumann Medical Center, 667 A.2d 479 (Pa. 1995). 10

Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954) 4

Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821) 4

Paszamant v. Ret. Accounts, Inc. 776 So. 2d 1049 (Fla. 5th DCA 2001). 12

Petit-Clair v. Nelson, 782 A.2d 960 (N.J. Super. Ct. App.Div. 2001) 12

Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972) 4

Sappington v. Miller Boatmen's Bank v. Crossroads West Shopping. 13

SBL Assoc. v. Village of Elk Grove, 247 Ill. App. 3d 25, 31, 617 N.E.2d 178, 182 (1st Dist. 1993). 13

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) 3

See Bivens, 403 U.S. at 407-08 (Harlan, J., concurring) 11

See Messier v. Southbury Training School, 916 F. Supp. 133, 142-146 (D.Conn. 1999) 3

See Wight v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir.2000) 12

See, e.g., MacMillan, Inc. v. Federal Ins. Co., 741 F. Supp. 1079 (S.D.N.Y. 1990) 7

See, e.g., Mayer v. Executive Telecard, Ltd., 705 A.2d 220 (Del. Ch. 1997) 10

Shearin v. E.F. Hutton Group, Inc., 1994 Del. Ch. LEXIS 69 (Del. Ch. June 7, 1994) 8

Smith v Van Gorkum 488 A. 2d 858 (Del. Supr. 1985) 9

Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995) (per curiam) 11

Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) 4

Third Nat'l Bank v. Celebrate Yourself Productions, Inc., 807 S.W.2d 704, 707-08 (Tenn. Ct. App. 1990) 5 5

Thornwood, Inc. vs. Jenner & Block, 799 N.E. 2d 756 (Ill.App. 1st 2003). 12

U.S. Constitution. United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996) 5

U.S. v. Lowe, 29 F. 3d 1005 (5th Cir. 1994) 11

U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980) 4

United States v. Balistrieri 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) ("Section [illegible]'a) of the Judicial Code) 4,5

Vtech Holdings, Ltd. V. Pricewaterhouse Coopers, LLP, 348 F.Supp.2d 255 (S.D.N.Y.2004); Tew, 728 F. Supp at 1560 12

Waldoboro Bank v. American Casualty Co., 775 F. Supp. 432 (D. Main 1991) 7

Walt Disney Derivative Litigation, 2003 Del.Ch.LEXIS 52 (May 28, 2003) 9

Weinberger V. UOP, Inc., Del.Supr., 459a.2d 701 (1983) 9

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), ... 3

Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987) 3

OPINIONS BELOW

On 3/01/06 The Court Of Appeals Issued an Order denying Appellee's Bill Of Cost. The Court Of Appeals submitted its opinion on 12/8/05 and filed its' Opinion on 2/10/06. On 8/05/05 The Court Of Appeals issued an Order Denying Appellant's Motion To Amend Caption. On 2/7/05 The Court f Appeals issued an ORDER denying Appellant's motion for reconsideration of the Clerk's Order dated 1/31/05. On 1/31/05 The Court Of Appeals issued an ORDER denying Appellant's motion for appointment of counsel. On 11/04/2005 the District Court For Delaware issued an Order denying Appellants' Motion for Reargument. On 8/25/2005 the District Court For Delaware Issued and Order denying Appellant's Motion To Correct & Reconsideration For Stay. On 1/11/2005 the District Court For Delaware issued an Order Dismissing Appellant's Complaint in its' entirety. On 9/14/2004 the District Court For Delaware issued Order staying pleadings after the time expired for Appellees' to issue a response, allowing Appellee's to file a Motion To Dismiss and set Briefing Schedules. ON 8/31/2004 the District Court For Delaware issued an Order denying Plaintiff's Motion to postpone the Rule 16 Scheduling Conference. On 7/16/2004 the District Court for the District Of Delaware issued an Order setting a Rule 16 Scheduling Conference.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The equal protection clause of the Fourteenth amendment to the United States Constitution provides in pertinent part:

> No state shall....deny to any person within its jurisdiction the equal protection of the laws.

The equal protection clause of the Ninth amendment to the United States Constitution provides in pertinent part:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

> The equal protection clause of the Seventh amendment to the United States Constitution provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. **State Courts Violation of Respondents Constitutional Rights, which went against Federal Law and the Constitution.** The Supreme Court discussed the standards for determining which federal statutes are enforceable under § 1983 in *Wright v. City of Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987), Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990), Suter v. Artist M., 503 U.S. 347, 355-356 (1992), and Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353 (1997). See Messier v. Southbury Training School, 916 F. Supp. 133, 142-146 (D.Conn. 1999).*

B. The resulting Wright/Wilder/Blessing test, set out in Blessing, supra, 520 U.S. at 340-341, states:

(1) There is a rebuttal presumption that a statute is enforceable under §1983 if the Petitioners can show that:

(a) Congress intended the provision to benefit the Petitioners;

(b) The right is not too vague and amorphous to enforce;

(c) The provision unambiguously imposes a binding obligation on the states.

(2) The statute is enforceable unless the Respondent can prove that Congress has foreclosed a §1983 remedy. (This has not been proven by Respondents)

Congress may clarify that a particular statute is not actionable under §1983, either by express words, or by providing a comprehensive alternative enforcement scheme. *Livadas v. Bradshaw, 512 U.S. 107 (1994).*

B. Respondents became State Actors, when the State allowed them to benefit from their ruling, which went against the Constitution and Respondents carried out crimes, as a result of the violation. When a judge acts as a trespasser of the law, when a judge does not follow the law, the judge loses subject-matter jurisdiction and the judge's orders are void, of no legal force or effect.

The U.S. Supreme Court, in *Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974)* stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."

The judge then acts not as a judge, but as a private individual (in his person).

The U.S. Supreme Court has stated that "No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it." *Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958).*

Any judge who does not comply with his oath to the Constitution of the United States wars against that Constitution and engages in acts in violation of the Supreme Law of the Land. The judge is engaged in acts of treason.

If a judge does not fully comply with the Constitution, then his orders are void, *In re Sawyer, 124 U.S. 200 (1888)*, he/she is without jurisdiction, and he/she has engaged in an act or acts of treason.

Whenever a judge acts where he/she does not have jurisdiction to act, the judge is engaged in an act or acts of treason. *U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821)*

In 1994, the U.S. Supreme Court held that "Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." *Liteky v. U.S., 114 S.Ct. 1147, 1162 (1994).*

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988)* (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri, 779 F.2d 1191 (7th Cir. 1985)* (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process.").

That Court also stated that Section 455(a) "requires a judge to recuse himself in any proceeding in which her impartiality might reasonably be questioned." *Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). In Pfizer Inc. v. Lord, 456 F.2d 532 (8th Cir. 1972)*, the Court stated that "It is important that the litigant not only actually receive justice, but that he believes that he has received justice."

Our Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", *Levine v. United States, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing Offutt v. United States, 348 U.S.*

11, 14, 75 S.Ct. 11, 13 (1954). A judge receiving a bribe from an interested party over which he is presiding, does not give the appearance of justice.

"Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse herself/himself sua sponte under the stated circumstances." *Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989)*.

Further, the judge has a legal duty to disqualify himself even if there is no motion asking for his disqualification. The Seventh Circuit Court of Appeals further stated that *"We think that this language [455(a)] imposes a duty on the judge to act sua sponte, even if no motion or affidavit is filed."* Balistrieri, at 1202.

Should a judge not disqualify himself as required by law, then the judge has given another example of his "appearance of partiality" which further disqualifies the judge. Should another judge not accept the disqualification of the judge, then the second judge has evidenced an "appearance of partiality" and has disqualified himself/herself. None of the orders issued any judge who has been disqualified by law are valid, they are void as a matter of law, and are of no legal force or effect.

Should a judge not disqualify himself, then the judge is violation of the Due Process Clause of the U.S. Constitution. *United States v. Sciuto, 521 F.2d 842, 845 (7th Cir. 1996)* ("The right to a tribunal free from bias or prejudice is based, not on section 144, but on the Due Process Clause.").

Should a judge issue any order after he has been disqualified by law, and if the party has been denied of any of his/her property, then the judge may have been engaged in the Federal Crime of "interference with interstate commerce". The judge has acted in the judge's personal capacity and not in the judge's judicial capacity.

Courts have repeatedly ruled that judges have no immunity for their criminal acts. Since both treason and the interference with interstate commerce are criminal acts, no judge has immunity to engage in such acts.

C. Violation of Petitioner's Constitutional Rights and Federal Law. Although an individual shareholder may bring a derivative suit to redress injuries to a corporation, the claims asserted in the suit belong to the corporation, not the individual shareholder, whose rights are merely derivative and may be asserted only through the corporation. Chancery Courts opinion **[Appendix 44a]** clearly goes against this, committing further violations against Petitioners. *See Third Nat'l Bank v. Celebrate Yourself Productions, Inc., 807 S.W.2d 704, 707-08 (Tenn. Ct. App. 1990) (citing Commercial Credit Development Co. v. Scottish Inns, Inc., 69 F.R.D. 110, 117 (E.D. Tenn. 1975))*. Consequently, a derivative suit cannot be maintained by a shareholder in Petitioners own name but must

be brought in the name of the corporation. However, the State Court disallowed this, by stating, "that it would not rule upon Indemnification, until proceedings are over, thus allowing access to counsel".

US Court of Appeals for the 3rd Circuit, commenting on the importance of derivative suits, stated:

Historically, the derivative suit has been the principal defense of the minority shareholder against abuses by the majority. Such suits protect the stockholders of a corporation against management, which is sometimes unrepresentative and on occasion insufficiently concerned with the minority's interests. Often where the wrongdoing is on the part of corporate officers and director's management has refused to act and where the wrongdoers control the corporation there is but small chance that the corporation itself will bring suit or vigorously prosecute the litigation. Equity, therefore, provided shareholders with the device of a derivative suit by means of which they could assert the interests of their corporation against management and third parties when those in control of the corporation were acting in breach of trust. *McClure v. Borne Chemical Co., 292 F.2d 824, 827 (3d Cir.), cert. denied, 368 U.S. 939 (1961).* However, Delaware State penalized Petitioners for invoking said right and stated, *"that the right was not that of the Corporation or Petitioner"* in **[Appendix 44a]** [Pg 27 of Transcript]. When Chancery Court 147-N ruled that Kafader of Ferry, Joseph and Pearce could represent Respondents in its' Court, State Farm and the Corporation, knowing that the case was a Derivative Action that Court violated the Corporations Constitutional and Civil Rights and violated the Ninth Amendment Right by trying to disparage the Corporation from bringing suit. (Again showing this to be a §1983 action) This Court knew at this time that this was a conflict of interest and ignored all the evidence and laws before it. State Farm was being sued on behalf of the Corporation, Respondents were being sued on behalf of the Corporation, Respondent Kafader, Ferry, Joseph and Pearce were being sued on behalf of the Corporation. Respondents believed that they would succeed in coercing and threatening Petitioners in giving up their Constitutional and Civil Rights. Only after presenting the State cause of action did Chancery Court and the State admit it erred, without correction.

The State Court indicated that these six (6) people were the company, by stating, *"Right. But as a legal matter, your understanding is incorrect. You are a shareholder. You have certain rights, important rights as a shareholder of a company, one of which is to file a derivative action, which is something that you've done. But the company itself is separate from the shareholders. And when you sue somebody, that's you personally as a shareholder suing. It's not the company."* **[Appendix 44a]**-[Pg. 28 of Transcript]) This court acknowledges Petitioner's suit was derivative, and

brought as a Director of the Corporation, at the same time going against the higher courts ruling that the derivative suit belongs to the Corporation. Petitioner's indemnification was denied stating that the derivative right was Petitioners personally and not that of the company, which is inaccurate.

Chancery Court further stated in **[Appendix 42a]**-[Page 9 of Transcript], *"And it will continue to operate that way until some court – if it ever does...."* Chancery Court is clearly stating that he may never entertain the current Complaint or any Compl int filed by Petitioners, thus violating Petitioners Constitutional and Civil Rights. Even after the US Court Of Appeals stated in its' Opinion based on the evidence presented before it that it saw *"there were quintessential state law causes of action; slander, violations of provisions of Delaware criminal code, questions of corporate governance, and violations of Delaware Code Of Professional Conduct"*, the State has failed to allow indemnification, the state has failed to supply or process Petitioner's Complaint for the felony charges outlined in the US Court Of Appeals briefs, the state has failed to rule upon and begin the judicial process. Even after the US Court Of Appeals decision these Respondents are now claiming that they too are entitled to immunity for the crimes they committed, of which the State has failed to respond to said Motion.

Indemnification ruled on and denied for Petitioner, but not ruled on regarding Respondents, who were never validly elected, where Respondents further acted in State, and continued to toll costs against the Corporation, based on States Violation. The Delaware Supreme Court confirmed in Civil Action 396, 2004 as noted in its' Order **[Appendix 48a]** Footnote 2 that, *"It appears that at all times relevant, McCollum herself was a member of the board." "Petitioner herself was a Director at all times relevant"*. The State Chancery Court, and Respondents jointly, both have continually denied Petitioner access to the Corporations insurance policy. The Delaware Supreme's Court Opinion should have served as an undertaking and support of Petitioner having been the only party confirmed to be a validly elected Director.

The Chancery's court opinion decided on July 24, 2004 **[Appendix 20a-25a]** clearly states that it did not and has not allowed Petitioners Indemnification to be invoked, because the issues were too premature to decide such. However, the Chancery Court never ruled upon the validity of Indemnification of Respondents, of which none of them are legal, and confirmed by their counsel **[Appendix 32a, 28-31a]**. This goes against. In *re P.J. Keating Company, 180 B.R. 18 (Bankr. D.Mass. 1995). See, e.g., MacMillan, Inc. v. Federal Ins. Co., 741 F. Supp. 1079 (S.D.N.Y. 1990); Atlantic Permanent Federal Savings & Loan Assoc. v. American Casualty Co., 839 F.2d 212 (4th Cir. 1988); Waldoboro Bank v. American Casualty*

Co., 775 F. Supp. 432 (D. Main 1991). This is clearly a substantial violation of State and federal laws and Petitioners First, Ninth and Fourteenth Amendment Rights, Civil Rights. (§1983 applies to all) If it is premature to allow Petitioners to be indemnified, it would also be premature to have and allow Respondents to utilize the Corporations policy or Corporations funds, prior to their following the proper indemnification procedure and believe this is not a violation of ones First, Seventh, Ninth and Fourteenth Amendment. Chancery Court has made a ruling to allow Petitioners advancement of fees and indemnification would be premature **[Appendix 20a-21a]**, but has allowed Respondents to continue raising costs against the Corporations policy and the Corporation, without ruling on their validity, in that none of the persons acting as Directors are valid and all were appointed by one another as the court documents show. Petitioners are the only parties who followed proper indemnification procedure in accordance to Title 8, Chapter 1, Subchapter IV, Section 145(d) of Delaware's General Corporation laws, which state as follows for indemnification: *"a majority vote of the directors who are not parties to such action, suit or proceeding...."*. can decide if a person is a valid director to be indemnified".....(3) *"if there are no such directors, or if such directors so direct, by independent legal counsel in written opinion, or (4) by the stockholders"*. The stockholders have been lied to by all Respondents and the Corporation's Counsel, who is a friend of the Respondent's counsel.

a. Delaware Title 8, Subchapter IV, Section 141 of the General Corporation Law.

b. Delaware Title 8, Subchapter IV, (a) of the General Corporation Law.

c. Delaware Title 8, Chapter 1, Subchapter IV, Section 145(d).

d. Indemnification is available regardless of the D&O's role in the litigation, including as a Petitioners, intervener or amicus curiae. Hibbert v. Hollywood Park, Inc., 457 A.2d 339 (Del. 1983). However, in *Shearin v. E.F. Hutton Group, Inc., 1994 Del. Ch. LEXIS 69 (Del. Ch. June 7, 1994)*, an officer who initiates a lawsuit is entitled to indemnification only if the lawsuit is brought as part of the officer's duties to the corporation or its shareholders. (Petitioners is not suing the Corporation) *Accord, Augat, Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996)*.

e. Respondents infer that Delaware Title 8, Section 145 (a)(b)(c) infers that persons defending a lawsuit are only entitled to indemnification. First, Petitioners in any proceeding can be defending a lawsuit. Furthermore, The Corporations Bylaws **[Appendix 51a-52a]** and Certificate Of Incorporation **[Appendix 53a]** provide much broader coverage then that of the General Corporation Laws. The Certificate Of

Incorporation **[Appendix 53a]**, number 10 provides broader coverage then the Bylaws and General Corporation laws and would not require Petitioners to pay any fees.

Walt Disney Derivative Litigation, 2003 Del.Ch.LEXIS 52 (May 28, 2003) supports the reckless acts of these parties.

Carmody v. Toll Brothers Inc., Del. Ch., CA No. 15983 (July 24, 1998) "Continuing director" provisions are designed to prevent a hostile suitor from engaging in a proxy contest or consent solicitation to remove an incumbent board of directors and then have the new board amend or redeem the poison pill (Respondents Vivardis). These provisions prevent the redemption or amendment of poison pills where there are no continuing directors, and if valid, provide a powerful weapon for a company to fend off a hostile takeover. *Smith v Van Gorkum 488 A. 2d 858 (Del. Supr. 1985)* Supreme court reversed and directed that judgment be entered in favor of the Petitioners and against the Respondents directors for the fair value of the Petitioners' stockholdings in Trans Union, in accordance with *Weinberger V. UOP, Inc., Del.Supr., 459a.2d 701 (1983)*.

In Pereira v. Cogan, 2003 U.S. Dist. Lexis 7818 (S.D.N.Y. 2003), the influential District Court for the Southern District of N.Y. held that a firms directors and officers had breached their fiduciary duties by failing to monitor and prevent the self dealing transactions of the chief executive officer.

The court analyzed which officers and directors had knowledge of these transactions and could have monitored or prevented them. (quoting *In re Healthco Int'l Inc. 1997 Bankr. LEXIS 465 (Bankr.D.Mass.April 9, 1997)*. In addition the court held that the officers and directors owed a fiduciary duty of due care, loyalty and good faith to Trace. These parties are not valid directors, who are continuing a fraud as a means to deceive the Corporation.

Of nine specific transactions that were challenged, two involved board action; ratifying Cogan's compensation and declaring Trace's dividends. In both instances the court found that the Directors breached their duties of loyalty and due care as established in the seminal case of *Cede & Co. v. Technicolor Inc., 634 A.2d 345 (Del.1993)*.

The court relied on the standards est. in *In re Caremark International Inc. Derivative Litigation, 698 A.2d 959 (Del.Ch.1996)*, stating directors legal obligation "to include duty to attempt in good faith to assure that corporate information and reporting system...exists, and the failure to do so under some circumstances may...render a director liable for losses caused by non-compliance with applicable legal standards.

Respondents tried concealing their acts by voting to ratify their illegal actions (under the Direction of their counsel Edward Kafader). **[Appendix 32a]** Ratification or condonation is not a defense for past criminal behavior. *See Gilbert v. United States, 359 F.2d 285, 287 (9th Cir.1966)* **[Appendix 34a]**, -[Pg 9 of Transcript] supports Kafader giving his blessings and encouragement of these violations. These persons chose to further appoint persons to a board established illegally, in an attempt to cover up their actions. Then in **[Appendix 71a]** Agenda dated 8/11/2004 under the direction and advice of Kafader, the board went before the Corp. attempting to have them certify their illegal acts. Kafader knew this was a violation of the Rules Of Professional Conduct.

In *Stifel Financial Corporation v. Cochran*, the court determined that officers and directors were entitled to attorney fees and other expenses incurred in bringing such a suit under a bylaw that provided for mandatory indemnification "to the full extent authorized by law." In so ruling, the court noted that allowing such "fees on fees" awards would prevent a corporation from wearing down a former director or officer with a valid claim for indemnification through extensive litigation. Stifel reversed an earlier line of cases establishing that "fees on fees" are not available unless expressly provided for *See, e.g., Mayer v. Executive Telecard, Ltd., 705 A.2d 220 (Del. Ch. 1997)*.

The right to advance of expenses can be much broader than the right to indemnification. *In Citadel Holding Corporation v. Roven, 603 A.2d 911 (Del. 1992)*, the Delaware Supreme Court interpreted an indemnification agreement as requiring the corporation to advance expenses incurred by a director who was sued by his corporation for violations... The Court considered this counterclaim as an affirmative defense, which triggers the advancement obligation. *See also, Megeath v. PLM International, Inc., Case No. 930369 (Cal. Sup. Ct. San Fran., Mar. 18, 1992); Lipson v. Supercuts, Inc., Civil Action No. 15074 (Del. Ch. Ct., Dec. 10, 1996); Neal v. Neumann Medical Center, 667 A.2d 479 (Pa. 1995)*. The Corporation Bylaws are clear in stating that advancement of fees is a contract right, and all issues before Chancery Court were brought on due to Petitioner's role as a Director. Respondents have attempted to wear down Petitioners (Ninth Amendment violation) while continuing criminal activity. If it were not for Petitioners being a Director these acts would not have been committed. However, Chancery Court argues that Petitioners defending these acts of persons committed while they were utilizing corporate property are personal and has penalized Petitioners. It is clear that these Respondents were and continue to act in State.

In Heffernan v. Pacific Dunlop GNB Corp., 1992 U.S. App. LEXIS 12595 (7th Cir., June 5, 1992), the court ruled that the Delaware indemnification statute applies to suits against directors and officers both

in their official capacity or if the suit arises more tangentially from his role, position or status as a director. In that case, a former director and shareholder of a company were sued for failure to disclose material information when he sold his stock in the company to another corporation. Although he was sued in his capacity as a shareholder (which would not alone trigger indemnification), the court permitted an indemnification claim against the corporation to proceed since his status as a director put him in a position where, in performance of his duties as a director, he either learned or should have learned of the material information which he did not disclose to the purchaser when he sold his stock. *See also, Barry v. Barry, 824 F.Supp. 178 (D.Minn. 1973) aff'd., 28 F. 3d 848 (8th Cir. 1994); U.S. v. Lowe, 29 F. 3d 1005 (5th Cir. 1994), Kapoor v. Fujisawa Pharmaceutical Co., 1994 Del. Super. LEXIS 233 (May 10, 1994); Augat, Inc. v. Collier, 1996 WL 110076 (D. Mass. Feb. 8, 1996).*

Case law supports indemnification is to be decided upon prior to any parties indemnifying themselves, especially if all parties are party to the suit.

*In Redyd v. Electronic Data Systems Corp., No. Civ. A. 19467, 2002 WL 1358761 at *3 (Del. Ch. June 18, 2002)* held that where the bylaws stated that an officer or director "shall be entitled to" indemnification and the advancement of expenses "as, and to the fullest extent, permitted by" "applicable state law, one court has held that a corporation must advance expenses even to a corporate vice president accused of criminal actions solely for his personal benefit.

Bivens and §1983 actions as analogous for most purposes, and "have typically incorporated §1983 law into Bivens actions." *Tavarez v. Reno, 54 F.3d 109, 110 (2d Cir. 1995) (per curiam) (citing Carlson v. Green, 446 U.S. 14, 18-20 (1980)); see also Ayeni v. Mottola, 35 F.3d 680, 688 n.10 (2d Cir. 1994); Ellis v. Blum, 643 F.2d 68, 84 (2d Cir. 1981).* The Supreme Court has made it clear that private corporations engaging in state action may be sued under § 1983. *See Lugar v. Edmonson Oil Co., 457 U.S. 922, 936-37 (1982). See Bivens, 403 U.S. at 407-08 (Harlan, J., concurring)*

Respondents Continuing to Solicit States Help, Against Federal Law, after US Court Of Appeals For Third Circuit's Opinion. After being protected by the State, and acting in accord to the states actions, Respondents, now argue before the State that claims against them should be dismissed, due to immunity, and that the State should ignore the US Court Of Appeals For The Third Circuit's Opinion, when this courts opinion supports the basis for bringing a claim against all Respondents.

Virtually all courts that have acknowledged the existence of aiding and abetting a fraud state that the following are the elements that must be established by the Petitioner:

a. There existed an underlying fraud;

b. The Respondent had knowledge of the fraud; (The State had knowledge of the fraud, and continued to protect Respondents.)

c. The Respondent provided substantial assistance to advance the commission of the fraud. (The State assisted with the Respondents in their commissioning of a fraud, by going against Federal law, which makes these parties State actors.)

See Wight v. BankAmerica Corp., 219 F.3d 79, 91 (2d Cir.2000); In re Worldcom, Inc. Secs. Litigation, 382 F.Supp. 2d 549 (S.D.N.Y. 2005); Vtech Holdings, Ltd. V. Pricewaterhouse Coopers, LLP, 348 F.Supp.2d 255 (S.D.N.Y.2004); Tew, 728 F. Supp at 1560; Thornwood, Inc. vs. Jenner & Block, 799 N.E. 2d 756 (Ill.App. 1st 2003).

9. To determine whether a duty sufficient to support a negligence claim exists, one begins by determining whether the Respondent by its conduct created a foreseeable zone of risk. *See McCain v. Florida Power Corp., 593 So.2d500 (Fla. 1992); Paszamant v. Ret. Accounts, Inc. 776 So. 2d 1049 (Fla. 5th DCA 2001).* Respondents, knew that their was a foreseeable risk, when he going before the Corporation on numerous occasions, informing the Corporation (while being videotaped) that Respondent "Kafader" was the Corporations Attorney, other Respondents Attorney and State Farms attorney (Respondents client and financier). Respondent "Kafader" gave his blessings (supported through court documents), advising others to commit and ratify crimes they committed, in a further attempt to help his client State Farm Insurance Company, with support of the State.

10. *In Newburger, Loeb & Co., Inc. v. Gross, 563 F.2d 1057 (2d Cir. 1977.*

11. The Model Rules Of Professional Conduct clearly mandates that a lawyer cannot represent a client whose business interests' conflict with a lawyer's own interests in the absence of client consent after full disclosure. The burden of proof in such situation is heavily weighted against the attorney. "[A] lawyer must refrain from entering into the transaction unless his client has consented after full disclosure by the lawyer." Id. "Full disclosure" not only means disclosure of the nature of the transaction, but it also means explaining to the client why he or she would benefit from independent counsel and insisting independent counsel be secured. *Petit-Clair v. Nelson, 782 A.2d 960 (N.J. Super. Ct. App.Div. 2001)* clearly supports this to be a violation of the Rules of Conduct. The Appellee attorneys who commissioned the fraud in these courts submitted any proof supporting that they are immune from the acts they committed.

After being protected by the State, and acting in accordance to the states actions, Respondents, now argue before the State that claims against them should be dismissed, due to immunity, and that the State should ignore the US Court Of Appeals For The Third Circuit's Opinion, when this courts opinion supports the basis for bringing a claim against all Respondents.

Respondents violation of a Settlement Agreement, while issues were pending in the US Court Of Appeals, which was never ruled upon, and where Petitioner informed the court to remove counsel as representation on her behalf, in order that the court consider the Motion.

Contract law governs the construction and enforcement of settlement agreements. *See Laserage Tech. Corp. v. Laserage Lab., Inc., 972 F.2d 799, 802 (7th Cir. 1992)*. Under contract law, a binding agreement requires a meeting of the minds or mutual assent as to all material terms. *See SBL Assoc. v. Village of Elk Grove, 247 Ill. App. 3d 25, 31, 617 N.E.2d 178, 182 (1st Dist. 1993)*. Whether the parties had a "meeting of the minds" is determined not by their actual subjective intent, but by what they expressed to each other in their writings. Thus, the parties decide for themselves whether the results of preliminary negotiations bind them, and they do so through their words. *See Empro Mfg. Co. v. Ball-Co Mfg., Inc., 870 F.2d 423, 425 (7th Cir. 1989) citing Chicago Inv. Corp. v. Dolins, 107 Ill. 2d 120, 481 N.E.2d 712, 715 (1985)*.

The element of consideration was discussed in *Dickey v. Thirty-Three Venturers*. The court in *Sappington v. Miller* Plaintiff contends that Respondents violated the UCC statute of frauds. Under this contract reached the UCC statute of frauds is applied, since, a e-mail and signed confirmation was received making this sufficient writing since it had not been objected to within 10 days or at all, as it was in its original content by Petitioner. These parties qualify as merchants under the UCC. The law should imply a requirement of "good faith and fair dealing" in the contract. As the court of appeals stated in *Boatmen's Bank v. Crossroads West Shopping*.

These Petitioners violated an agreement, when Petitioner refused to sign on to items outlined in a letter documented and signed off by Respondents, contending and agreeing to the only terms agreed upon. All parties had a meetings of the minds, but when Petitioner refused to agree to false information Respondents violated the settlement agreement.

In *Kokkonen v. Guardian Life Ins. Co. of America*, the United States Supreme Court addressed the issue of a diversity action which was settled and a stipulation and dismissal under Rule 41(a)(1)(ii), governing retention

of jurisdiction. The crimes committed herein occurred while this court held and retained jurisdiction.

[Appendix 74a-75a] outlines the terms of the settlement made between one of State Farms attorney's, and **[Appendix 74a-75a]** outlines that the other State Farm Attorney, was informed and aware of a settlement, but all parties refused to adhere to said settlement terms, because Petitioner would not agree to fraudulent terms added after the agreement had been made and terms never discussed.

SUMMARY OF ARGUMENT

Petitioner respectfully ask this court to 1) hold that Respondents were and did act in state 2) reverse the decision of the United States Court of Appeals and remand all issues back to Federal Court For Trial by Jury 3) instruct the courts to rule upon indemnification in accordance to the law 4) Determine if a settlement was made while issues were before the federal courts 5) Award Petitioner costs expended thus far for trying to protect the rights of the Corporation and her family. These Respondents and the State acted jointly in order to deny a right guaranteed by the US Constitution. Even in all Federal Courts a party cannot come before it representing a Corporation, without having counsel, and not to rule upon Indemnification and continue to allow Respondents and the State to block this right, would be a further violation of Petitioner's rights to received due process of the laws, when Petitioner clearly was a Director, and there clearly is an insurance policy in place to protect Directors for preventing such crimes as committed by Respondents. Respondents in this case, and the insurance company all acted based on the States violations and profited and gained from the States violations, and all should be held accountable for the violations committed.

Respectfully submitted,

Cathy D. Brooks-McCollum
PO BOX 12166
Wilmington, DE 19850
(302) 521-1241